UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, *et al*.,

Plaintiffs – Appellees,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, and the STATE OF WASHINGTON,

Defendants – Appellees,

and

JOSE TREVINO, ISMAEL G. CAMPOS, and State Representative ALEX YBARRA,

Intervenor-Defendants – Appellants.

No. 23-35595

D.C. No. 3:22-cv-05035-RSL
U.S. District Court for Western Washington, Tacoma

APPELLANTS' REPLY TO RESPONSE IN SUPPORT OF THEIR MOTION FOR A STAY

Relief Requested by: December 22, 2023

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INTRODUCTION

Plaintiffs' theories under the Voting Rights Act ("VRA") make a mockery of that landmark statute, and the district court's injunction adopting them should be stayed along with proceedings below.

In a nutshell, Plaintiffs' claim is that a *majority*-minority district that has a roughly 51.5% Hispanic citizen voting age population ("HCVAP") unlawfully *dilutes* the voting strength of Hispanic voters. The district court's endorsement of that theory is virtually unprecedented and would be strange enough in a vacuum. It becomes outright bizarre when considered against the backdrop of the most recent election: in 2022, a Hispanic candidate won a landslide 35-point victory in the district over a White candidate. Trial Ex. 1055.

So the injunction below rests on the never-before-seen premise that a district with a majority HCVAP, which produced a landslide victory for a Hispanic candidate over a White one, unlawfully *dilutes* Hispanic voting power. None of these basic facts are disputed. And merely to state them directly is to demonstrate the absurdity of the decision below. It will not survive on appeal and this Court should stay it now before more judicial and private resources are consumed by this folly.

But amazingly things get stranger still. What is Plaintiffs' proposed remedy for the putative unlawful *dilution* of Hispanic voting strength? To *dilute* that voting strength *further*. Specifically, while the district is currently 52.4% HCVAP based on

2021 population numbers, *each and every one* of Plaintiffs' five proposed maps dilutes that strength: ranging from 46.9% to 51.4%.[1] It does so by, among other things, weakening Hispanic voting strength by injecting *White* Democratic voters into the district. That dilution violates—and makes a mockery of—the VRA. And it is further an intentional racial gerrymander that violates the Equal Protection Clause and Fifteenth Amendment.

In the end, this action is a cynical attempt to exploit—and invert—the VRA to *dilute* minority voting strength to achieve desired *partisan* aims. The only way to make any sense of these grotesque contortions of the VRA is the critical fact that the victor in the district, Nikki Torres, is a Hispanic *Republican* and not Democrat.

In Plaintiffs' view, however, Hispanic voters lack agency to select their own preferred candidate. Instead, Plaintiffs' paternalistic view as to who they *should* prefer is controlling. Plaintiffs' own opposition here lay bare that premise, stating: "Drs. Barreto and Collingwood [opined] that Latino voting in the election was cohesive at levels consistent with past elections in favor of Lindsey Keesling,"—*i.e.*, that Keesling (a White Democrat) was actually the preferred candidate of Hispanic voters and that "testimony from Drs. Barreto and Collingwood confirms that

[1] Trende Decl. at 13, 38, 50. Plaintiffs' proposed remedial maps were filed two business days before Intervenors' motion for a stay was filed. *See* APP000110.

[Torres] was not" the "candidate of choice" of Hispanic voters. Soto Palmer Opp. at 10, 13 & n.8 (DktEntry: 35-1).

In essence, Plaintiffs' experts—and not the Hispanic voters of the district—know best whom Hispanic voters should prefer. That is not only offensive stereotyping, but mathematical nonsense: Nikki Torres could not have achieved a *35-point* victory in a *majority* Hispanic district if Keesling was the clear choice of Hispanic voters.

"It is a sordid business, this divvying us up by race." *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part). That sordidness is even more acute when (1) the divvying is pursued to *dilute* minority voting strength and (2) employs *race-based means* to achieve naked *partisan ends*. The district court's merits decision is thus unlikely to survive appellate review—and remedial proceedings are a transparent waste of judicial and private resources. A stay is warranted to prevent that waste now.

ARGUMENT

I. INTERVENORS HAVE APPELLATE STANDING HERE

Given the stark realities detailed above, Plaintiffs predictably attempt to shield the district court's errors from review and consequently argue that Appellants lack appellate standing to bring this appeal. Not so.

The three traditional elements of standing are well known to this Court: a party

must assert: "(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019). Intervenor standing is no different: "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986). For appellate standing, "the test is whether the intervenor's interests have been adversely affected by the judgment." *Beck v. U.S. Dep't of Com.*, 982 F.2d 1332, 1338 (9th Cir. 1992); *see also ASARCO, Inc. v. Kadish*, 490 U.S. 605, 618–20 (1989) (finding appellate standing where court's adjudication independently created a case or controversy as to the individuals' personal interests affected by the lower court decision). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U. S. 47, 52 n.2 (2006).

Thus, if any Appellant here is injured by the judgment below, he has standing to appeal, and this Court has jurisdiction. And such injury is readily apparent here.

Take Petitioner Trevino. Trevino is a voter who lives in enacted (and enjoined) LD-15. From the beginning, Trevino has asserted he has an individual constitutional right in this § 2 litigation not to be gerrymandered on the basis of race or ethnicity. *See Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). That personal

constitutional interest in this statutory case flows from the reality that "compliance with the Voting Rights Act . . . pulls in the opposite direction" of the Equal Protection Clause because it "insists that districts be created precisely because of race." *Id.*

Here, the district court invalidated LD-15 and, although at times unclear in its specifications, ordered the creation of a new map that mandates the sorting of voters based on race. The historical practice (as well as unavoidable realities) of redrawing a map pursuant to a Section 2 invalidation involves the use of race in doing so, as the Supreme Court has long noted. *See id.* The simple fact is that the judgment of the District Court effectively mandates that Mr. Trevino (and all other individuals within enjoined district 15) be sorted *based on race*. *See* APP000093-APP000096 (concluding that a majority HCVAP "results in an inequality in the electoral opportunities enjoyed by white and Latino voters" and ordering a new map).

That is cognizable injury since "a racial classification causes *'fundamental injury'* to the 'individual rights of a person[.]'" *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (emphasis added) (citation omitted); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2162 (2023) ("Distinctions between citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of

equality.").[2] And here that fundamental injury flows directly from the District Court's Section 2 injunction and decision. *See ASARCO*, 490 U.S. at 618–20. As a voter subject to the redistricting powers of the District Court, Trevino will suffer cognizable injury in the remedial proceedings from the resulting racial sorting.

Representative Ybarra also has an injury sufficient to convey standing. Specifically, Rep. Ybarra has an interest in knowing which voters will be included in his district. *See* Stay App. at 6-7. This is an interest that at least one other circuit has recognized and that the Supreme Court has reserved. *See League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018) (In the context of intervention: "[T]he contours of the maps affect the Congressmen directly and substantially by determining which constituents the Congressmen must court for votes and represent in the legislature."); *see also Bethune-Hill*, 139 S. Ct. at 1956; (reserving for future determination whether "harms centered on costlier or more difficult election campaigns are cognizable"); *Wittman v. Personhuballah*, 578 U.S. 539, 545 (2016)) (same). This is an individual injury specific to him and his position as a member, not an institutional injury experienced by every Washington legislator or house of the legislature. *See Raines v. Byrd*, 521 U.S. 811, 821 (1997) (holding that legislator had standing where he had "been singled out for specially unfavorable

[2] Whether such race-based districting might be constitutionally permissible here is a merits issue separate from the standing inquiry, which recognizes cognizable injury based on the racial sorting itself.

treatment as opposed to other Members of their respective bodies").

II. THIS COURT IS LIKELY TO REVERSE THE DISTRICT COURT'S INJUNCTION

A. The District Court's Unprecedented Holding That A *Majority*-Hispanic District Unlawfully Dilutes Hispanic Voting Strength Is Likely To Be Reversed On Appeal

Remarkably, Defendant-Appellee State of Washington, when addressing Appellants' likelihood of success on appeal, does not even attempt to explain how the lower court's decision will survive an ultimate review of its merits (whenever that may come). *See generally* State of Wash. Opp. This is likely because the district court's conclusion is as novel as it is incorrect. Indeed, this is the first time any court has found that a majority-minority district by citizen voting age population—from which a minority candidate was elected—dilutes that minority group's voting power. Such an errant conclusion will not survive appeal.

Plaintiffs' countervailing arguments fail. For example, much as they attempt to highlight the purported compactness of their illustrative district's *boundaries*, Plaintiffs have failed (like the district court) to demonstrate that the *minority population inside those boundaries* is compact—which is what the VRA requires. *Perry*, 548 U.S. at 433 ("'The first *Gingles* condition refers to the *compactness of the minority population*, not to the compactness of the contested district.'" (citation omitted) (emphasis added)). Plaintiffs also ignore that the Latino community in the Yakima valley is not politically cohesive. *See* Stay App. at 76-77 (finding in an

analysis of the only endogenous election held under the enacted LD-15 that Latinos voted for the Latina Republican at somewhere between 32 to 48 percent, depending on which expert conducted the analysis). This failure is also fatal to Plaintiffs' vote dilution claim. *Gomez v. Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988); *see also Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023).

Moreover, Plaintiffs are unpersuasive when they opine that a majority-minority CVAP district *might* be capable of diluting minority vote. *See Perez v. Abbott*, 253 F. Supp. 3d 864, 880 (W.D. Tex. 2017). Although "it may be possible for a citizen voting-age majority to lack real electoral opportunity," *Perry*, 548 U.S. at 428, that is simply not the case here, where there is no evidence that Hispanics lack "equal access to the polls." *See Smith v. Brunswick County*, 984 F. 2d 1393, 1402 (4th Cir. 1993). Instead, here, a Latina candidate won with substantial support from Hispanic voters. And to undersigned counsel's knowledge, the only courts that have found Section 2 violations resulting from majority-minority districts—or drew majority-minority districts with higher percentages of a minority population than the challenged maps—did so when the minority population possessed a majority VAP but not CVAP, or the court was presented with a minority coalition district (*i.e.*, combining different minority groups to form a majority-minority district). *See, e. g.*, *Terrazas v. Slagle*, 789 F. Supp. 828, 835 (W.D. Tex. 1991) (court plan "increased the Black VAP in District 15 from 14.9% to 15.9%, boosting the combined Black

and Hispanic VAP in that district by almost 2%"). Neither situation applies here.

In sum, for any number of errors, the lower court's decision is destined for reversal on appeal, and a stay is warranted here.

III. THE REMAINING FACTORS SUPPORT A STAY HERE

A. Appellants Will Suffer Irreparable Harm Absent A Stay

The remedy phase below evidences the harm of racial sorting—a *per se* harm when not required by law, *see Cooper v. Harris*, 581 U.S. 285, 292–93 (2017)—which is moving closer from hypothetical to actual. *See generally* APP000110-APP000153. Plaintiffs' remedy to purported dilution of the Hispanic vote is further dilution of the Hispanic vote. *Id.* Why? So Plaintiffs can get a Democrat elected in LD-15. This is the very harm the VRA was enacted to stop: partisans diluting minority votes to gain electoral advantage. *See Allen*, 143 S. Ct. at 1498–1500 (detailing the history of the Voting Rights Act). And the Supreme Court has long held that racial classification in redistricting causes a "fundamental injury" to the individual rights of a person sorted by his race. *Shaw*, 517 U.S. at 908. Indeed, by its very nature, racial sorting causes an irreparable injury, even if it is justified. *Id.*

Moreover, Plaintiff-Appellees argue that the timing of Appellants' stay application "strongly suggest[s]" that Appellants "face no impending harm." State of Wash. Opp. at 20 (DktEntry: 35-1). Not so. Appellants sought a stay in the district court first, as they were required to do, and then sought a stay from this Court shortly

after the district court's denial.

B. The Balance Of Harms And Public Interest Support A Stay

The public interest and balance of harms favor Appellants here, particularly as racial sorting inflicts "fundamental injury," *Shaw*, 517 U.S. at 908, and is "odious to a free people whose institutions are founded upon the doctrine of equality," *Fair Admissions*, 143 S. Ct. at 2162.

Moreover, Plaintiffs' proposed remedy demonstrates that they will suffer no harm from a stay. In one breath Plaintiffs contend that, if a stay is granted, they will be forced to vote under the enacted map that purportedly dilutes their vote. State of Wash. Opp. at 22 (DktEntry: 36-1). In their next breath, Plaintiffs ask the lower court to implement maps that further *dilute* Hispanic voting power. *See* APP000110-APP000153 (proposing remedial maps that *lessen* the HCVAP in LD-15). In short, Plaintiffs propose a cure worse than the alleged disease. Consequently, a stay would preserve the status quo, thereby preventing harm to Appellants—as well as to Appellees, who claim to be injured by vote dilution (which they curiously seek themselves). Thus, both the balance of harms and "the public interest lie[] with maintaining the *status quo* while the appeal is pending." *Doe v. Trump*, 957 F.3d 1050, 1068 (9th Cir. 2020).

CONCLUSION

This Court should stay the district court's injunction and proceedings below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(B) and Circuit Rule 27-1(1)(d) because this motion contains 2,407 words spanning 10 pages, excluding the parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman size 14-point font with Microsoft Word.

Dated: December 18, 2023

/s/ Jason Torchinsky
Jason Torchinsky

CERTIFICE OF SERVICE

I hereby certify that on December 18, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will notify all registered counsel.

/s/ Jason Torchinsky
Jason Torchinsky